IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants.	)	
_____	)	

TYSON FOODS, INC.'S MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT AND INTEGRATED OPENING BRIEF IN SUPPORT

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule of Civil Procedure 7.1, Defendant Tyson Foods, Inc., joined by Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively "Defendants"), hereby move this Court for an order completely or partially dismissing claims four, five, six, seven, eight, nine, and ten of the First Amended Complaint ("Complaint") for failure to state a claim upon which relief can be granted.

The State of Oklahoma and Oklahoma's Secretary of the Environment (collectively the "Oklahoma Plaintiffs" or "Plaintiffs") brought suit in this Court against fourteen out-of-state poultry companies. The lawsuit alleges that the independent farmers or "growers" who raise poultry for defendants, pursuant to contracts, are violating Oklahoma common law and statutes by engaging in the longstanding agricultural practice of using poultry litter as fertilizer.[1] Specifically, the Oklahoma Plaintiffs claim that water running off fertilized fields pollutes the Illinois River Watershed ("IRW"), which crosses from Arkansas into Oklahoma (and eventually flows back into Arkansas after joining the Arkansas river).

Among other theories, the Oklahoma Plaintiffs allege that the use of poultry fertilizer in both Oklahoma and Arkansas creates a nuisance *per se* under Oklahoma law (count 4); creates a nuisance under federal common law (count 5) ; constitutes a trespass upon Oklahoma's property interests under Oklahoma law (count 6); violates Oklahoma statutory prohibitions on waste disposal (count 7); violates Oklahoma's Animal Waste Management Plans

[1] Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., and Simmons Food, Inc. all have their principal place of business in the State of Arkansas. First Amended Complaint at ¶¶ 6-10, 15-18. Defendant Aviagen, Inc. has its principal place of business in Alabama. *Id.* at 10. Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. have their principal places of business in Mississippi. *Id.* at ¶¶ 11-12. Defendants Cargill, Inc. and Cargill Turkey Production, LLC have their principal places of business in Minnesota. *Id.* at ¶¶ 13-14. Defendant Willow Brook Foods, Inc. has its principal place of business in Missouri. *Id.* at 19.

(count 8); violates Oklahoma statutes and regulations barring waste discharges to surface and ground waters (count 9); and unjustly enriches the Defendants under Oklahoma law (count 10). For convenience, Counts 4 and 6-10, which seek to apply Oklahoma common law, statutes, and regulations will be referred to collectively as the "Oklahoma Law Claims."

To the extent that the Oklahoma Law Claims pertain to activities occurring in Arkansas or pollution allegedly emanating from Arkansas, those claims should be dismissed. *First*, the Oklahoma Law Claims are preempted by the Clean Water Act, 33 U.S.C. §§ 1251-1387, which exclusively governs matters involving interstate water pollution. *Second*, to the extent the Oklahoma Law Claims seek to apply Oklahoma law to activities in the State of Arkansas (thereby displacing Arkansas statutes, regulations, and common law), these claims constitute an impermissible attempt at extraterritorial regulation in violation of the Commerce and Due Process Clauses of the United States Constitution. *Third*, the Oklahoma Plaintiffs' claim for relief under the federal common law of nuisance (Count 5) must be dismissed as no such federal common law of nuisance exists to govern claims of interstate water pollution.

II. BACKGROUND

The Clean Water Act ("CWA"), the common name for the 1972 Amendments to the Federal Water Pollution Control Act, is a far-reaching and complex statutory scheme "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), CWA § 101(a). The CWA is implemented through a balanced Federal-State partnership that finely allocates responsibilities among varying levels of government.

Disputes concerning control over interstate waters and interstate water pollution are not novel. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Missouri v. Illinois*, 200 U.S. 496 (1906). In fact, the States of Arkansas and Oklahoma have recently litigated over pollution levels in the Illinois River. *See Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (upholding

EPA's issuance of a CWA permit to City of Fayetteville, Arkansas on the grounds that it would not violate Oklahoma's water quality standards). Here, the State of Oklahoma alleges that Defendants' independent contractors are causing pollution throughout the entire 1,069,530 acre IRW, which is bisected by the Arkansas-Oklahoma border. Complaint ¶ 22; Complaint, Exh. 1 (map). The Oklahoma Plaintiffs admit that approximately half of the IRW lies outside of Oklahoma's boundaries. *See id*. And, Plaintiffs do not limit their claims to activities occurring within the state of Oklahoma; to the contrary, the claims are based upon the assertion that farmers throughout the IRW are "routinely and repeatedly applying" poultry litter to lands within the entire IRW. Complaint at ¶ 49. *See also id.* at ¶¶ 22-31, 54, 58-64.

The Plaintiffs further admit that, by invoking Oklahoma law, their goal is to change the agricultural methods and practices of persons residing throughout the region, including in Arkansas. *See* Complaint at ¶¶ 1, 69, IV.3 (requesting a permanent injunction requiring Defendants "to immediately abate" the use of poultry fertilizer throughout the IRW). In short, Plaintiffs admit that they are attempting to use the Oklahoma Law Claims to impose the standards of Oklahoma state law outside the borders of the State.

III. LEGAL STANDARD

"The court's function on a Rule 12(b)(6) motion is . . . to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1211 (10th Cir. 2005) (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (quotations omitted)). In considering the motion, the court must accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). In spite of the deference afforded to the Plaintiff's factual allegations, it is not proper for the court to assume that the

plaintiff can prove facts not alleged in the complaint "or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, the court does not give any deference to "unsupported conclusions or interpretations of law." *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993). Dismissal is appropriate if it "'appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'" *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

IV. ARGUMENT

The Oklahoma Plaintiffs seek to apply federal common law and Oklahoma state law to practices in, and water pollution allegedly emanating from, another State. These claims should be dismissed as a matter of law.

A. THE CLEAN WATER ACT PREEMPTS OKLAHOMA STATE LAW ON CLAIMS OF INTERSTATE WATER POLLUTION

Although the Complaint only addresses the issue in a generalized fashion, *see* Complaint at ¶ 55, under the CWA the sources of alleged pollution in the IRW must fit within one of two classifications: either a "point source" or a "nonpoint source." *See Pronsolino v. Nostri*, 291 F.3d 1123, 1125-26 (9th Cir. 2001). "Point source" water pollution comes from a single, identifiable source or "point" such as a factory or a sewage plant. *See International Paper Co. v. Oullette*, 479 U.S. 481, 485 n.4 (1987). For example, certain concentrated animal feeding operations (called "CAFOs"), are defined as point sources under the CWA. *See* 33 U.S.C. § 1362(14), CWA § 502(14). All other generalized sources of alleged pollution are considered to be "nonpoint" sources of pollution. *Pronsolino*, 291 F.3d at 1126. Regardless of which form of water pollution is at issue here, the CWA's pervasive federal regulation of *both*

point and nonpoint sources preempts the Oklahoma Law Claims. The Oklahoma Plaintiffs' state law claims must therefore be dismissed to the extent they are asserted against alleged activities in or pollution stemming from the State of Arkansas.

In analyzing whether state law has been preempted by federal regulation, the first question is whether the federal law preempts the entire "field" or of law and regulation. Congress may elect to occupy an entire field of regulation—thereby barring *any* state regulation on that topic. *See Ouellette*, 479 U.S. at 491 (noting that field preemption occurs where "federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation") (quotations omitted); *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1190 (10th Cir. 1999) ("state or local law may be preempted if it attempts to regulate conduct in a field that Congress, by its legislation, intended to be occupied exclusively by the federal government.") (quotation omitted). Even where Congress does not occupy an entire field of regulation, state law is preempted to the extent it conflicts with federal law. *See Ouellette*, 479 U.S. at 494.

The CWA Occupies the Field of Point Source Water Pollution: In the area of water pollution from "point sources," the Supreme Court already has ruled, in *International Paper v. Ouellette*, 479 U.S. 481, that State law actions to remedy such pollution are preempted by the CWA.

In *Ouellette*, a group of Vermont property owners filed a nuisance suit under Vermont's common law against a New York pulp and paper mill operated by International Paper Company. 479 U.S. at 484. The property owners alleged that International Paper discharged pollutants into Lake Champlain, which forms part of the border between Vermont and New York. *Id.* at 483-484. These discharges, according to the suit, created a continuing nuisance

under Vermont law, as the water was rendered "foul, unhealthy, smelly, and . . . unfit for recreational use." *Id.* at 484 (alteration in original) (quotations omitted). The property owners demanded compensatory and punitive damages as well as an injunction requiring International Paper to change its water treatment system. *Id.*

The Supreme Court dismissed the suit because it concluded that Congress intended for the CWA to "dominate the field of [interstate water] pollution regulation." *Id.* at 492. Because Congress has occupied the field of interstate water pollution, the Court held that "an affected State only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490. This holding was mandated by the Supreme Court's prior ruling in *Milwaukee v. Illinois* ("*Milwaukee I*"), 451 U.S. 304 (1981), in which the Court held that the CWA is "an all-encompassing program of water pollution regulation" that "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317-318. The Supreme Court emphasized that the CWA "applies to all point sources and virtually all bodies of water . . ." *Ouellette*, 479 U.S. at 492; *see also Milwaukee II*, 451 U.S. at 318 ("*Every* point source discharge is prohibited unless covered by a permit which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.") (footnote omitted).

While resting its holding on the doctrine of field preemption, the Supreme Court in *Ouellette* also noted that State causes of action would impermissibly conflict with federal regulation. "[W]e are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 493 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713

(1985)). Among other harms, allowing State law causes of action for interstate water pollution would impede regulatory certainty for citizens and regulators in interstate watersheds and would frustrate Congress' intent to avoid interstate conflict over the application of state nuisance laws. *See Ouellette*, 479 U.S. at 496 ("The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty."); *id.* n.17 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'") (quoting Prosser & Keen on Torts 616 (5th ed. 1984)); *id.* at 496-497 ("For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.") (quoting *Milwaukee v. Illinois* ("*Milwaukee III*"), 731 F.2d 403, 414 (7th Cir. 1984)).

In this case, the effort to apply the Oklahoma Law Claims against Arkansas point sources is preempted by the CWA. As the Supreme Court cautioned, any attempt to apply Oklahoma state law to point source discharges occurring in Arkansas "could effectively override both the [CWA's] permit requirements and the policy choices made by the source State." *Id.* at 495. In asking this Court to declare Defendants liable for damages based on conduct in Arkansas and in seeking an injunction that would apply in Arkansas, *see* Complaint ¶¶ IV.1-8, the Oklahoma Plaintiffs seek to "do indirectly what they could they could not do directly – regulate the conduct of out-of-state sources." *Id.* at 495. Accordingly, inasmuch as the Oklahoma Plaintiffs seek to impose legal obligations and liabilities on Arkansas point sources, this Court must dismiss the Oklahoma law claims.[2]

[2] Nor is the Oklahoma Plaintiffs' effort at interstate water regulation permitted by the CWA's savings clause. The CWA preserves "the right of any State or political subdivision . . . to adopt or enforce" more stringent effluent standards than provided by federal law, so long as they do not "impair[ ] or in any manner affect[ ] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. As both the Supreme

The CWA Occupies the Field of Non- Point Source Water Pollution: The same preemption analysis applies to any attempt on the part of the Oklahoma Plaintiffs to impose Oklahoma law on Arkansas *nonpoint sources*. Federal regulation of nonpoint sources under the CWA is equally comprehensive and therefore preempts the Oklahoma Law Claims through both field and conflict preemption.

The CWA imposes a pervasive and intricate system of obligations in order to reduce nonpoint source pollution. Nonpoint source pollution includes all discharges to waters of the United States that fall outside the definition of a point source discharge, such as "rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants" into surface or groundwater. 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003). Given their nature, nonpoint source discharges are difficult to regulate and Congress therefore constructed a complex regulatory structure under CWA §§ 303 and 319 that imposes responsibility on each State to make its own policy choices and impose its own regulations on conduct occurring within its borders. *See Pronsolino*, 291 F.3d at 1126 (control of nonpoint sources are "distinctly different" than control of point sources) (citation omitted). The congressional decision to use a different approach does not make control of nonpoint source pollution any less comprehensive. *Cf. Milwaukee II*, 451 U.S. at 323 ("The difference in treatment between overflows and treated effluent by the agencies is due to differences in the *nature* of the problems, *not* the extent to which the problems have been addressed").

Federal involvement in managing nonpoint sources begins with each State's

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Court and the lower federal courts have held, this language means only that the CWA does not preempt a state from regulating activity that occurs within the state's own boundaries. *See Ouellette*, 479 U.S. at 494, 498-99; *Milwaukee III*, 731 F.2d at 405, 413 (holding that the CWA's savings clause did "no more than to *save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters*") (emphasis added).

development of Water Quality Standards. These standards require States to specify (1) a designated use for each individual water body (such as recreation or a source of drinking water); (2) the maximum amount of pollutants that the water body can tolerate while serving this desired use; and (3) an antidegradation review policy. *See*, *e.g.*, 33 U.S.C. § 1313(c)(2)(A), CWA § 303(c)(2)(A); 40 C.F.R. § 131; *American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001). These standards, along with a Water Management Plan, are submitted to EPA for approval or rejection with required changes, 33 U.S.C. § 1313(c)(2)-(3), CWA § 303(c)(2)-(3).[3] "The EPA provides states with substantial guidance in drafting water quality standards," *City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996) (citing 40 C.F.R. § 131.11), and the entire process requires public notice and a public hearing. 33 U.S.C. § 1313(c)(1), CWA § 303(c)(1); 40 C.F.R. § 131.10(e). Where these Water Quality Standards are not met, each State is obligated to list and prioritize substandard water bodies, called "impaired waters." 33 U.S.C. § 1313(d)(1)(A) & (B), CWA § 303(d)(1)(A) & (B). For each impaired water, the State must calculate the Total Maximum Daily Load ("TMDL") of pollutants that the water body can receive without exceeding Water Quality Standards. 33 U.S.C. § 1313(d)(1)(C), CWA § 303(d)(1)(C); 40 C.F.R. § 130.7. Both mechanisms aid in determining the contribution of nonpoint sources to impaired waters and how best to control them on a watershed-by-watershed basis. The Ninth Circuit's description of the TMDL program shows how this "intricate scheme" is interconnected: "TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution

[3] Water Quality Standards were to be adopted sometime shortly after 1972 with a State review every three years. The results of these reviews are to be submitted to EPA. 33 U.S.C. § 1313(c)(2), CWA § 303(c)(2). States are obligated to maintain a "continuing planning process" under CWA § 303(e)(3)(A) which must be approved by an EPA official. 40 C.F.R. §§ 130.5(a), (c).

reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals." *Pronsolino*, 291 F.3d at 1128-1129.

The Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987), amended the CWA and tasked States with both detailed reporting and planning requirements for nonpoint sources. CWA § 319 requires each State to submit a State Assessment Report to EPA, after holding a State-level notice and comment rulemaking, identifying (1) impaired waters "which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to maintain applicable water quality standards . . ."; (2) categories and subcategories of nonpoint sources and "particular nonpoint sources which add significant pollution" to impaired waters; (3) a process that uses "intergovernmental coordination and public participation" to develop best management practices ("BMPs") for controlling each category and subcategory of nonpoint source "to the maximum extent practicable"; and (4) programs to control nonpoint source pollution. 33 U.S.C. § 1329(a)(1), CWA § 319(a)(1). The EPA Administrator may reject the plan as inadequate, mandate resubmission with modifications by the State, 33 U.S.C. § 1329(d)(2), CWA § 319(d)(2), or prepare its own report if the State refuses to comply. 33 U.S.C. § 1329(d)(3), CWA § 319(d)(3). *See also Pronsolino*, 291 F.3d at 1138-1139 (describing regulation under CWA § 319).

States also must provide EPA, after public notice and a hearing, a management program containing the following: (1) identification of BMPs and measures to reduce nonpoint source pollution from each category and subcategory; (2) identification of all programs that can aid in implementing the BMPs; (3) a schedule of "annual milestones" for implementation of the BMPs; (4) the State Attorney General's certification that State laws provide adequate authority to impose the BMPs on nonpoint sources; and (5) a list of federal grant programs that will aid the

program. 33 U.S.C. § 1329(b)(2), CWA § 319(b)(2). Each management plan must be developed on a watershed-by-watershed basis with the help of technical experts, 33 U.S.C. § 1329(b)(3), (4), (e), CWA § 319(b)(3), (4), (e), and submitted to EPA for approval. 33 U.S.C. § 1329(d), CWA § 319(d). The Administrator may reject the plan as inadequate and mandate resubmission with modifications by the State. 33 U.S.C. § 1329(d)(2), CWA § 319(d)(2). "Under section 319(b), all States have . . . adopted management programs to control nonpoint source pollution." 68 Fed. Reg. at 60,655. Together with CWA §303, § 319 "is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues." *Pronsolino*, 291 F.3d at 1133.

Congress also created a mechanism for settling multi-state disputes regarding interstate waters, such as the IRW. CWA § 319(g) allows any state to petition the Administrator for an Interstate Management Conference when the water body fails to meet its water quality standards "in whole, or in part [due to] pollution from nonpoint sources in another State . . . ." The Administrator has no discretion to deny this conference – and "*shall* convene[ ] a management conference of all States which contribute significant pollution resulting from nonpoint sources . . . ." *Id.* (emphasis added). The Administrator will then coordinate "an agreement among such States to reduce the level of pollution in such portion resulting from nonpoint sources . . . ." *Id.*

Given the intricacies of federal regulation of interstate nonpoint source pollution, there should be no question that it is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Ouellette*, 479 U.S. at 491 (quotations omitted). Additionally, allowing Oklahoma to sue under its own common law of nuisance and other state laws for transboundary pollution would conflict with Congress' intent

(including Congress' instruction for the EPA Administrator to mediate interstate disputes under CWA § 319(g)).[4]

The legislative history of the CWA also supports the conclusion that Congress intended to preempt State and federal common law claims in this area. For example, Representative Hammerschmidt, a House conferee on the 1987 amendments to the CWA, declared that allowing States to "impose [their] own statutory or common law upon residents of other States…would have been contrary to a rational, orderly, and consistent regulatory scheme… [i]nterstate water pollution should be – and will remain – the subject of uniform Federal law and not the conflicting laws of various states." 133 Cong. Rec. 986-987 (1987).

[4] The current CWA and its regulation of nonpoint sources bears no resemblance to *Illinois v. Milwaukee ("Milwaukee I")*, 406 U.S. 91 (1972), where the Supreme Court allowed a federal common law nuisance claim to proceed at a time when federal regulation of water pollution was minimal. The universe of federal water protections at the time included only (1) "some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage" under the Rivers and Harbors Act; (2) the consideration of the environment in federal decisionmaking under the National Environmental Policy Act; (3) an expression of "increasing concern with the quality of the aquatic environment" through the passage of the Fish and Wildlife Act of 1956 and its amendments; (4) an Army Corps of Engineers rule expressing "new and expanding policies" requiring permits for discharges into navigable waters; and (5) the Water Quality Standards under the Federal Water Pollution Control Act. *Milwaukee I*, 406 U.S. 91, 101-102 (1972). Few regulations existed as the nascent EPA was only two years old at the time. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) (creating the EPA from portions of the Department of the Interior, Department of Health, Education, and Welfare and Department of Agriculture). Even with this barren regulatory backdrop, however, the Supreme Court relied on a savings clause in the CWA which expressly preserved "state and interstate action[s] to abate pollution of interstate or navigable waters. . . ." *Milwaukee I*, 406 U.S. at 104. Five months after the Court released its decision in *Milwaukee I*, Congress passed the CWA. Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972). These amendments have "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee II*, 451 U.S. at 317. That Congress has since passed additional measures specifically addressing nonpoint sources only augments the completeness of the CWA. Most importantly, the savings clause which served as the fulcrum of *Milwaukee I*'s decision to allow a federal common law action was subsequently deleted from the Federal Water Pollution Control Act. *See* H.R. Rep. No. 92-911 at 173 (1972) (listing §10(b) among the "Existing Law" supplanted by the CWA). Today, both the deletion of the savings clause and the major subsequent revisions work to prevent State common law or statutory claims to intrude on such a pervasive federal scheme.

Similarly, in the debate of the 1985 amendments the EPA emphasized that application of state law to claims of interstate water pollution would only interfere with the implementation of the CWA:

> [P]ermitting states to apply state law to abate out-of-state discharges will significantly impair the federal government's ability to carry out a national pollution control policy. The Act creates a federal-state partnership in the area of interstate water quality . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements…If one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.

Amending the Clean Water Act: Hearings Before the Subcommittee on the Environmental Pollution of the Senate Environment and Public Works Committee, 99th Cong. 25-26 (1985) (EPA Response to Congressman Moody).

In keeping with Congress' intent to exclude state law from the regulation of interstate water pollution, the final version of the Water Quality Act of 1987 explicitly stripped authorization for State common law actions from a Senate version of the bill. *See* 133 Cong. Rec. at 987 (praising the demise of § 119 of the Senate bill).[5] This is strong evidence that Congress did not intend to endorse State common law actions in the area of interstate water quality so soon after they were condemned by the Seventh Circuit and the U.S. Supreme Court.[6] *See Thompson v. Kennickell*, 797 F.2d 1015, 1024-1025 (D.C. Cir. 1986) (deletion of provision

[5] The deleted § 119 read: "This section preserves State common law, permitting a person in a downstream State who is injured or aggrieved by pollution from an upstream State to seek relief in the courts of the injured party's State or in the courts of the neighboring State through State common or statutory law." 131 Cong. Rec. 15317 (1985). States would have been able to "bring actions involving State law, in cases involving water pollution arising in another State, in Federal district court" had this savings clause not be excised from the Bill. S. Rep. No. 99-50 at 50 (1985).

[6] *Milwaukee III* was decided by the Seventh Circuit in 1984. *Ouellette* was decided by the U.S. Supreme Court on January 21, 1987; the Water Quality Act of 1987 was enacted on February 4, 1987. Pub. L. No. 100-4, 101 Stat. 42 (1987).

in earlier bill is evidence of congressional intent). *Cf. Rusello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Congress was undoubtedly aware of the issues raised in both *Ouellette* and *Milwaukee III*.[7] Allowing the Oklahoma Law Claims to proceed now would effectively countermand Congress' rejection of state law regulation of interstate water quality and undermine "the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The fact that Oklahoma, or its Attorney General, would prefer different or more stringent regulation of nonpoint sources is not a defense to preemption.[8] Congress has

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[7] *See, e.g., Amending the Clean Water Act: Hearings Before the Subcommittee on the Environmental Pollution of the Senate Environment and Public Works Committee*, 99th Cong. 25-26 (1985) (EPA Response to Congressman Moody) (discussing *Milwaukee III*); 133 Cong. Rec. at 1591 (1987) (Statement of Rep. Simpson) ("There are a number of delicate yet critical questions concerning intergovernmental relations in water quality regulation, and I am pleased that the U.S. Supreme Court will take the opportunity this term to wrestle with conflicting circuit court opinions concerning the laws applicable in cases where affected parties in downstream states allege harm from permitted discharges in upstream states. Along with other members of the Environment and Public Works Committee, I will carefully examine the court's ultimate holding in *International Paper v. Ouellette*, which is anticipated early this year.").

[8] *Dicta* in some cases suggests that nonpoint sources are unregulated. *See American Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution"); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously… [gave] EPA authority under the Act to regulate only" point sources). Two of these cases were decided before the Water Quality Act of 1987 added § 319, and amended CWA § 303 and are thus inapposite in addition to being *dicta*. *American Wildlands*, the only recent case, concerned whether EPA properly approved Montana's antidegradation and mixing zone policies under the Administrative Procedure Act. 260 F.3d at 1196. No question of

recognized the challenges presented by nonpoint source pollution, and has chosen not to impose the type of particularized and discriminatory effluent limitations that Oklahoma is advocating here. *See* 68 Fed. Reg. 60,653, 60,654 (Oct. 23, 2003) (EPA places "emphases on watershed-based planning and on restoring impaired waters through developing and implementing TMDLs, represent the current state of the art in fashioning watershed-based solutions to prevent and remedy water quality problems."). The existing regulatory scheme is not a consequence of neglect, but of a deliberate congressional decision to regulate nonpoint sources differently than point sources. While Congress has continued to afford States "a strong voice in regulating their own pollution," *Ouellette*, 479 U.S. at 490, they must proceed against nonpoint source pollution from other States in accordance with the CWA; not through *ad hoc* state law lawsuits against persons or industries they deem to be disfavored.

In sum, because Congress has "eliminat[ed] dual regulation and substitut[ed] regulation by one agency," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), the Oklahoma law claims against Arkansas point sources and nonpoint sources must be dismissed as preempted by the CWA.[9]

B. OKLAHOMA'S CLAIMS VIOLATE THE COMMERCE CLAUSE AND THE SOVEREIGNTY OF ARKANSAS

The Oklahoma Plaintiffs seek to extend Oklahoma law beyond the State's borders into Arkansas. To the extent that the Oklahoma Law Claims concern commercial activities conducted in, and pollution allegedly emanating from, Arkansas, they run afoul of the dormant

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preemption was ever presented to that court. Considering the comprehensive requirements of CWA §§ 303 and 319, detailed above, claims that nonpoint source discharges are free of federal oversight are incorrect and should be afforded no precedential weight.

[9] In noting that the CWA occupies the field of both point and non-point pollution in claims of interstate water pollution, Defendants take no position on whether the conduct alleged in the Complaint would properly be classified as point or non-point discharges under the CWA.

Commerce Clause, U.S. Const., Art. I, § 8, and the constitutional principles of federalism and due process that afford each State sovereignty within its own borders.

1. Regulation of Commerce In Another State Violates the Commerce Clause

The dormant Commerce Clause prohibits States from regulating "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion)). Put another way, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Thus, Plaintiffs, through this litigation, cannot impose Oklahoma's commercial and environmental standards upon citizens of Arkansas conducting business within Arkansas.

Indeed, the Supreme Court has expressed little hesitation in prohibiting State regulatory action that has the practical effect of directly regulating interstate commerce. *See, e.g.*, *Healy*, 491 U.S. at 324 (striking down a liquor price affirmation statute); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (striking down New York liquor regulations where they would "force those other States to alter their own regulatory schemes"); *Edgar*, 457 U.S. at 624 (striking down Illinois law which imposed regulations upon corporate takeovers of companies with certain minimum contacts with Illinois); *Baldwin v. Seelig*, 294 U.S. 511 (1935) (striking down minimum price requirements for milk). In all of these cases, the regulating State had an interest in protecting its citizens from certain harms—such as higher prices or potentially deceptive or harmful investment practices—but, due to the direct regulatory effect upon interstate commerce, the Supreme Court has "struck down the [State action] without further inquiry." *Brown-Forman*, 476 U.S. at 579.

Here, by attempting to impose Oklahoma standards upon Arkansas citizens, the Oklahoma Plaintiffs seek to do that which was prohibited in *Healy*, *Brown-Forman*, *Edgar*, and

Baldwin. The Oklahoma Plaintiffs undeniably endeavor to impose additional obligations on commerce occurring wholly within Arkansas, *see id.* at VI.3 (seeking a permanent injunction to abate Tyson's alleged "pollution-causing" business practices). The complaint plainly sets forth purported violations of Oklahoma's statutory regulatory scheme governing waste discharges and Oklahoma's Animal Waste Management Plans for use of poultry litter as a natural fertilizer (counts 7-10) and seeks to enjoin that practice, *even against* that activity which occurs within Arkansas.

Moreover, the Oklahoma Plaintiffs' action, by attempting to enforce Oklahoma law within the territorial borders of Arkansas, will plainly displace Arkansas's statutes, regulations, and common law, or it will require Defendants to conform to two potentially incompatible sets of standards. *Healy*, 491 U.S. at 337 (noting that the "practical effect" of competing state legislation "is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was mean to preclude"). Thus, the Oklahoma Plaintiffs' lawsuit "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*; *Edgar*, 457 U.S. at 642 ("[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."). Should Defendants be found liable under the Oklahoma Law Claims, they may be required to change their commercial practices to avoid future violations of Oklahoma law even though these practices are currently lawful in Arkansas. The Commerce Clause precludes Plaintiffs from requiring Arkansas citizens "to seek regulatory

approval in [Oklahoma] before undertaking" commercial activity in Arkansas. *Brown-Forman*, 476 U.S. at 337.

Nor can Plaintiffs contend that the Defendants' business practices—be it the more general raising of poultry or the more specific use of chicken litter as natural fertilizer—is not commerce. Control of a company's societal obligations, such as the management of pollution, enforcement of labor laws, and restrictions on anti-competitive activities have historically been viewed as the regulation of interstate commerce. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (federal regulation of water pollution is premised on Congress' power to regulate interstate commerce).

It is clear that the Oklahoma legislature never intended to apply its laws in other states, but even if the legislature had such an intent, the enforcement of the law "is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

In short, suing to compel the businesses of other States to comply with the Oklahoma Plaintiffs' state laws constitutes the direct regulation of interstate commerce. *See Healy v. Beer Institute*, 491 U.S. at 332. This Court should dismiss the Oklahoma law claims as a violation of the Commerce Clause.

2. Extraterritorial Application of Oklahoma Law Violates the Sovereignty of Arkansas

Similarly, it is axiomatic that each State is a sovereign entity unto itself. "[T]he attributes of sovereignty [are] enjoyed by the government of every State in the Union." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("the States entered the federal system with their sovereignty intact"). So, while the

Plaintiffs proclaim their "complete dominion" regarding "the interest of the State of Oklahoma," Complaint ¶ 5, they have no dominion, control, influence, or authority over Arkansas' agricultural, environmental or commercial laws. *See Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular"). Plaintiffs endeavor to project their own policy choices into Arkansas, a sovereign State entitled to make differing policy choices regarding agricultural practices. Such an attempt violates the fundamental principal that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states." *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934).

The Constitution protects the citizens of all States from interstate encroachments of State power; the Supreme Court has emphasized "the due process principle that a state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954). Accordingly, in a wide range of contexts, the Court has crafted remedies under the Due Process Clause of the Fourteenth Amendment to preclude the extraterritorial application of one State's laws into another State's jurisdiction. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (due process clause limitations on punitive damages); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (due process clause limitations on class certification); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (due process clause limitation of proscribing advertising). As a common thread in each of these decisions, the Supreme Court has prohibited the enforcement of State laws that would make unlawful conduct that is otherwise lawful in the State where the activity occurred. *See State Farm*, 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); *Shutts*, 472 U.S.

at 822 (holding that Kansas cannot abrogate other inconsistent State laws for activities occurring within those States); *Bigelow*, 421 U.S. at 824 ("Virginia possessed no authority to regulate the services provided in New York….").

Here, the Oklahoma Plaintiffs' attempt to enforce Oklahoma law within Arkansas plainly violates this due process principle, which finds support in the most fundamental tenets of federalism. *See State Farm*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."). Arkansas has an extensive set of statutes and regulations that would be displaced if the Oklahoma Plaintiffs were successful in projecting Oklahoma law into Arkansas. Arkansas regulates the land application of poultry litter within Arkansas in accordance with its own legislative judgments.[10] *See* Ark. Code Ann. §§ 15-20-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws). Oklahoma has not alleged that land application of poultry litter in Arkansas violates any of these Arkansas laws. In pursuit of their own goals, the Oklahoma Plaintiffs would rob Arkansas of the "police power [which] is an attribute of sovereignty inherent in every sovereign state . . . ." *Oliver v. Oklahoma ABC Bd.*, 359 P.2d 183, 189 (Okla. 1961).

[10] Oklahoma also regulates the land application of poultry litter, a lawful act in Oklahoma that is protected from the very nuisance action that Plaintiff brings against Tyson's Arkansas facilities. *See* Okla. Stat. tit. 27A § 10.9 *et seq.* (Oklahoma Registered Poultry Feeding Operations Act); Okla. Stat. tit. 50 § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance").

In sum, entertaining the Oklahoma law claims would violate basic "principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America v. Gore*, 517 U.S. 559, 573 (1996). As this Court is asked by Oklahoma to enjoin that which is lawful in Arkansas, the Oklahoma law claims must be dismissed.

C. THE OKLAHOMA PLAINTIFFS' FEDERAL COMMON LAW NUISANCE CLAIM HAS BEEN DISPLACED BY THE CLEAN WATER ACT

Oklahoma's federal common law claim must also fail because there is no federal common law of nuisance applicable to its claim of interstate water pollution. Although such a body of federal common law existed at one time, it has been displaced by Acts of Congress.

Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the United States Supreme Court has recognized federal common law only in limited areas that are notably few and restricted. The Supreme Court has also made clear that even if a federal common law cause of action is recognized, it may be displaced at any time by an Act of Congress. In the case of federal common law nuisance claims based on interstate water pollution, the principles expressed by the Court in *Milwaukee II*, 451 U.S. 304, make clear that Congress' passage of the CWA and its subsequent amendments displaced the federal common law regarding both point source and nonpoint source pollution. Accordingly, Oklahoma's federal common law nuisance claim should be dismissed for failure to state a claim upon which relief can be granted.

1. "There is no general federal common law"

Prior to the Supreme Court's decision in *Erie*, 304 U.S. 64, the federal courts had developed a body of federal common law to govern interstate environmental nuisance claims brought by States. *See, e.g.*, *New Jersey v. New York*, 283 U.S. 336 (1931) (addressing controversies between States that are fed by the same river basin); *New York v. New Jersey*, 256

U.S. 296 (1921) (addressing controversies between States that border the same body of water); *Missouri*, 200 U.S. 496 (addressing controversies between a State that introduces pollutants into a waterway and a downstream State that objects). In *Erie*, however, the Supreme Court held that "[t]here is no federal general common law." *Erie*, 304 U.S. at 78. The Court thereby eviscerated the foundation upon which prior common law interstate environmental nuisance precedents rested. In short, "*Erie* recognized . . . that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee II*, 451 U.S. at 313.

2. Federal Common Law Only Exists In Limited Areas And May Be Displaced At Any Time By Congress

Since *Erie*, the Supreme Court has held that when Congress has not spoken to a particular issue, and when there exists a "significant conflict between some federal policy or interest and the use of state law," *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966), the federal courts may formulate federal common law only in "limited" areas that are notably "few and restricted." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (internal citations omitted); *see also Milwaukee II*, 451 U.S. at 313. Always recognizing that federal common law is "subject to the paramount authority of Congress," *Milwaukee II*, 451 U.S. at 313-314 (quoting *New Jersey*, 283 U.S. at 348), the Supreme Court has consistently applied these separation-of-powers principles to refuse to create federal common law in cases that involve "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot," *Texas Indus.*, 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

3. The Clean Water Act And Its Subsequent Amendments Displaced Federal Common Law On Issues of Interstate Water Quality

In Count Five of the complaint, the Oklahoma Plaintiffs invoke federal common law. However, any federal common law that existed in the area of interstate water quality has been displaced by Acts of Congress. As discussed in detail above, in *Milwaukee I*, 406 U.S. 91, the Supreme Court recognized the existence of a federal common law claim for an abatement of a nuisance caused by interstate water pollution, but stated that the federal common law cause of action ceases to exist if Congress displaces it through legislation or regulation. *Id.* at 107 n.9. Following the passage of the CWA, the Court held in *Milwaukee II* that the federal government's comprehensive regulatory scheme created by the 1972 amendments displaced the plaintiff State's federal common law nuisance claims. 451 U.S. at 307-08. The Court thereby resolved any doubt that Congress had displaced all interstate environmental nuisance claims based on federal common law. *Id.* at 325 ("The invocation of federal common law . . . in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control."); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (stating that *Milwaukee II* held that federal law displaced the federal common law tort of nuisance with respect to transboundary water pollution claims). As discussed above, subsequent to *Milwaukee II*, which specifically addressed federal legislation governing point source transboundary water pollution, Congress expanded its regulation of transboundary water pollution to include nonpoint source pollution thought its enactment of Sections 303 and 319 of the Clean Water Act.[11] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987). Congressional action has thus

[11] As discussed in detail above, Section 303 of the Clean Water Act governs federal oversight of the States' development of Water Quality Standards, and Section 319 of the Clean Water Act requires States to comply with detailed federal reporting and planning requirements for nonpoint sources. See supra at 4-15.

displaced federal common law of nuisance claims for interstate water pollution disputes in both point source and nonpoint source disputes.[12]

Plaintiffs cannot escape the holding of *Milwaukee II* by complaining that Congress did not address these particular facts or that the CWA does not provide an adequate remedy. The standard for determining when Congress has displaced federal common law is different from—and far less demanding than—the standards that govern preemption of state law. Because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," courts should approach the question of displacement with a "willingness to find congressional displacement of federal common law." *Milwaukee II*, 451 U.S. at 317 & n.9 (emphasis deleted). As long as "the scheme established by Congress addresses the problem formerly governed by federal common law," *id.* at 315 n.8—*i.e.*, if Congress has "spoken to [the] particular issue," *id.* at 313—federal common law is displaced. *See also United States v. Oswego Barge Corp. (In re Oswego Barge Corp.)*, 664 F.2d 327, 335 (2d Cir. 1981) (federal common law displaced "as to every question to which the legislative scheme 'spoke

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[12] The Act's legislative history supports the conclusion that Congress' enactment of Sections 303 and 319 of the Clean Water Act did not alter the principles of the *Milwaukee II* decision:

> I am pleased that the conferees deleted provisions in each bill related to savings clauses and other statutes. As a result, the Water Quality Act of 1987 does not in any way affect the well-established rulings of Milwaukee I, II, and III involving the Clean Water Act. Taken together, these decisions hold that, in interstate water pollution disputes, a downstream plaintiff State may not apply Federal common law nor the State common or statutory law of the downstream State against an upstream State with EPA-approved water pollution control requirements.
>
> . . .
>
> *Today, Congress leaves this comprehensive regulatory mechanism intact and does not in any way imply that Federal common law remedies are available to supplant or supplement remedies already available under the Clean Water Act.*

133 Cong. Rec. 986-987 (statement of Rep. Hammerschmidt) (emphasis added).

directly,' and every problem that Congress has 'addressed'. . . . [and] separation of powers concerns create a presumption in favor of [displacement] of federal common law *whenever it can be said that Congress has legislated on the subject*") (emphasis added) (quoting *Milwaukee II*, 451 U.S. at 315). Congress need not create an alternative remedy to displace federal common law: "The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

There can be no doubt that Congress has "addressed" and "spoken to" the issue of interstate water pollution in the CWA. Although the Plaintiffs may not approve of Congress' policy choices, Oklahoma's federal common law claim should be dismissed because it, and all other interstate water pollution claims based on federal common law, have been displaced by Acts of Congress. Oklahoma cannot avoid the fate of the plaintiff in *Milwaukee II* by merely electing not to bring a statutory claim against the defendants under the CWA, or by asserting claims under other federal statutes. The law is clear: all federal common law causes of action for nuisance based on interstate water pollution no longer exist, irrespective of whether the claim is based on allegations of point source or nonpoint source pollution. Accordingly, Count Five of the complaint should be dismissed for failure to state a claim upon which relief can be granted.

VI. CONCLUSION

For the foregoing reasons counts four, five, six, seven, eight, nine, and ten of the Complaint should be dismissed.

Dated: October 3, 2005

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